SUPREME COURT, U. S.

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No. 174

In the Supreme Court of the United States

OCTOBER TERM, 1968

HOWARD DEAN HANSEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a–13a) is not yet reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 14a) was entered on April 25, 1968. On May 23, 1968, Mr. Justice White extended the time for filing a petition for a writ of certiorari to June 10, 1968, and on June 8, 1968, the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

313-233—68

QUESTIONS PRESENTED

1. Whether the grand jury was properly composed.
2. Whether documentary evidence was improperly admitted.

STATEMENT

Petitioner was convicted, after trial by jury in the District of South Dakota, of one count charging him with stealing three head of cattle from an Indian on an Indian reservation in violation of 18 U.S.C. 661 and 1152 (II R. 25). He was fined $1,000 and sentenced to four years' imprisonment under the provisions of 18 U.S.C. 4208(a)(2), with eligibility for parole at the discretion of the parole board (II R. 28). He contends that the grand jury that indicted him was drawn from an unlawfully compiled jury list; that documentary evidence was improperly admitted against him although he had not been informed of its existence pursuant to the requirements of Rule 16(g), F.R. Crim. P.; and that those two asserted errors, together with unspecified trial errors, deprived him of a fair trial.

In support of his jury challenge, petitioner submitted an affidavit by his attorney which asserted that the jury panel from which the grand jury was chosen did not reflect the population of the division with respect to age, family income and occupations, and that it contained no laborers (I R. 50–53). Additionally, he offered the testimony of an attorney of eighteen years' experience (IV R. 25) who had tried twenty-five cases in the division in the preceding ten-year period (IV R. 27). The attorney, who specialized in

condemnation cases (IV R. 39), made it a practice to make inquiries concerning the background of veniremen in preparation for his cases (IV R. 28). He testified that during the eight (out of fifteen) terms since the fall of 1960 for which he had copies of the jury list in his office, only one farm laborer had served on a jury, and that he would be very surprised if more than one or two had served on juries during the other terms (IV R. 29). He offered the same conclusion in regard to daily wage earners (IV R. 30). He said that, although Indians had been called as jurors, from his observation they were all employees of the government or of various tribal councils (IV R. 31–32). He concluded that most jurors were "community leaders", and "established people of the so-called economic and social strata in this portion of South Dakota that are quite influential" (IV R. 33–34). The witness acnowledged, however, that because of the nature of his law practice his main interest in making inquiries was to determine property ownership rather than income (IV R. 37), and that he did not inquire into the ethnic background of veniremen (IV R. 40). He also made no inquiries regarding veniremen from two nearby counties since either he or his partners or employees would be likely to know the individuals, and if not he could elicit enough information on *voir dire* for his purposes (IV R. 47, 50).

The goverment produced a deputy clerk who testified that the clerk obtained the names of potential jurors by sending letters asking for suggestions to

county court clerks, county treasurers, and directors of equalization (IV R. 61–62). Questionnaires were then sent to the persons whose names were submitted (IV R. 62). In placing names in the jury box, no attention was paid to race or to occupation (other than exempt occupations), and the incomes of the persons were unknown (IV R. 65). The clerk and the jury commissioner each placed an equal number of names in the box (IV R. 67). The deputy clerk had no knowledge of the manner in which the commissioner selected his names (IV R. 66).

The district court, after an *in camera* inspection of the papers reflecting the results of the condemnation attorney's investigation of the then current jury panel, found that the panel contained many persons of average or below average income, working at ordinary jobs, and that some were in fact unemployed (IV R. 79). It held that petitioner had not shown the systematic exclusion of any wage group, race, color, creed, or of any person by reason of occupation, and more particularly that petitioner had failed to carry his burden of showing the systematic exclusion of farm or other laborers in the same general income or age group as himself (IV R. 80).

ARGUMENT

1. The method by which the jury was selected presents no issue warranting review. The question has no general importance in view of the newly enacted Jury Selection and Service Act of 1968 (P.L. 90–274, 82 Stat. 53) which goes into effect on December 22, 1968. The findings of the courts below that petitioner had

not shown the arbitrary exclusion of a class are amply supported by the record.

The use by the clerk of the "key man" system as a source for names was lawful. *Scales* v. *United States*, 367 U.S. 203, 259, affirming 260 F. 2d 21, 44–46 (C.A. 4); *Mobley* v. *United States*, 379 F. 2d 768, 773 (C.A. 5); *United States* v. *Hoffa*, 349 F. 2d 20, 29–30 (C.A. 6), affirmed, 385 U.S. 293; *Padgett* v. *Buxton-Smith Mercantile Company*, 283 F. 2d 597, 598 (C.A. 10), certiorari denied, 365 U.S. 828; *Dow* v. *Carnegie-Illinois Steel Corporation*, 224 F. 2d 414, 427 (C.A. 3), certiorari denied, 350 U.S. 971. Proportional representation on jury lists is not required. *Swain* v. *Alabama*, 380 U.S. 202, 208. The requirement is that there be no systematic and intentional exclusion of any group eligible for jury service. See *Ballard* v. *United States*, 329 U.S. 187, 193; *Thiel* v. *Southern Pacific Company*, 328 U.S. 217, 220–225. Petitioner's statistical showing concerning the then current jury panel and the generalized conclusions of the condemnation attorney concerning past panels were not sufficient to raise a prima facie inference of systematic and intentional exclusion. No inference of specific prejudice to petitioner arises from the fact that he allegedly is a farm laborer and persons of that occupation may not have had full representation on the various jury panels. There has been no showing that farm laborers are a "cognizable class" in the sense of being "the subject of prejudice." See *Swain* v. *Alabama*, *supra*, 380 U.S. at 205; compare *Hernandez* v. *Texas*, 347 U.S. 475, 479–480.

2. Prior to trial, petitioner moved pursuant to Rule

16, F.R. Crim. P., for copies of all documents within the possession or control of the government reflecting sales of livestock by him or by persons succeeding him in ownership of such livestock (I R. 2). The motion was granted in regard to all documents which the government intended to use as evidence (I R. 20), and the government was directed to inform petitioner if any matter within the purview of the order thereafter came into its possession (I R. 47).

In accordance with the order, the government furnished petitioner with copies of sellers' sheets obtained from livestock exchanges (IV R. 276). During trial, the government offered into evidence buyers' sheets which supplemented the sellers' sheets. The government had neither furnished these sheets to petitioner nor informed him of their existence because it had itself only learned of their existence subsequent to compliance with the order (IV R. 277–278). It neither had custody nor had made copies of the documents (IV R. 275, 279). The trial court found that the government had not acted in bad faith (IV R. 200), and permitted introduction of those of the buyers' sheets which were relevant without granting petitioner a continuance.

The court's ruling was correct. The buyers' sheets were merely cumulative; as the court of appeals pointed out, their main function was "to provide an easier understanding of the chain of title of the allegedly stolen cattle" (Pet. App. 12a). Petitioner's

counsel visited the livestock exchanges on numerous occasions as part of his trial preparation, and had never been refused information (IV R. 278). As the Notes of Advisory Committee on Rules explain in regard to Rule 16(g), trial courts are given "wide discretion" in dealing with failures to comply with discovery orders which "permit the court to consider the reasons why disclosure was not made, the extent of the prejudice, if any, to the opposing party, the feasibility of rectifying that prejudice by a continuance, and any other relevant circumstances." The judge here did clearly exercise that discretion with due regard to the relevant factors. It should be noted by way of comparison that, when the government attempted on rebuttal to introduce documents reflecting sales by petitioner's mother in order to refute a segment of her testimony for petitioner, the court rejected such documents for noncompliance with the order to produce (V R. 640), even though the government had had neither possession nor copies (IV R. 634).

As the court of appeals held in regard to petitioner's assertion of cumulative error (Pet. App. 13a), "[a]ny number of 'almost errors,' if not 'errors,' cannot constitute error." *Hammond* v. *United States*, 356 F. 2d 931, 933 (C.A. 9).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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